

The distribution of the land among the creditors is not similar to the present case, because that is equivalent to an actual payment and division of the price.

The Lord Ordinary reported the cause on informations.

Observed on Bench ; The estate does not effectually belong to the purchaser till he pay the price. Till then the securities of the creditors remain entire, and of consequence the subject continues pledged to the preferable creditors, to the full amount of their debts. This is not inconsistent with what was found in the case of *Brown* against the *York-Buildings Company*.

THE COURT unanimously found, " That the creditors who stand preferably ranked upon the different funds, as established by the decree of ranking, are now entitled to draw their payment *in suo ordine* out of these funds ; and that any loss which has arisen thereupon since the original sale of Mr *Rae's* estate in 1771, falls upon the postponed creditors."

Lord Ordinary, *Craig*.
Alt. *Hay*.

For the preferable Creditors, *Maconochie*.
Clerk, *Mitchelson*.

R. D.

Fol. Dic. v. 4. p. 214. Fac. Col. No 77. p. 170.

1795. February 4.

The TRUSTEE of DAVID DICKSON against The CREDITORS of JOHN RAE.

POINT I.

A PROCESS of ranking and sale having been brought by the Creditors of the late *John Rae*, a decree of ranking was extracted in 1770, and on 19th December of that year, the lands of *Hurkledale*, part of his estate, were sold to *General Stewart Douglas*, at the price of L. 6310, which he found caution to pay at *Martinmas 1771*, with interest from *Martinmas 1770*.

David Dickson stood ranked upon these lands for L. 1188 : 5s, as at *Martinmas 1770*, at which term it was agreed, that the principal and interest due to all the creditors should be accumulated into one sum, bearing simple interest.

In 1775, he applied for, and after a good deal of opposition, both from the other creditors and from *General Douglas*, obtained an interim warrant upon the latter, for payment of his debt, and by means of diligence used against the General, he received various partial payments.

In 1791, *David Dickson* assigned the balance remaining due to him, in trust to *John Dickson*, writer to the signet.

In 1789, the lands of *Hurkledale* were again sold by the creditors, for L. 6520, *General Douglas* having been unable to pay up the balance of the purchase-money, which at this time, after deducting the partial payments

No 37.

No 38.

When a creditor on an estate brought to judicial sale, obtains partial payments to account of his debt, in virtue of an interim warrant on the purchaser, and afterward claims for the remainder of it upon the general fund under division, he is not entitled, in a question with the creditors, to impute the pay-

No 38.

ments he has received, periodically towards extinction of the interest which may have grown on his debt since he obtained the warrant, but must turn them into a corresponding capital, as at the period when the price began to bear interest.

made by him to David Dickson and others, amounted with interest to upwards of L. 7000. The cautioners for General Douglas were however able to pay the difference between the price which the lands gave at the second sale, and the balance due by the General on the first.

The price brought by these lands at the second sale, and various other funds belonging to the common debtor, having been recovered, the Trustee for Dickson, in place of proceeding against General Douglas' cautioners, appeared in the process of division, and claimed to be ranked for the balance due upon his constituent's debt, which he alleged amounted to L. 978 : 17 : 2.

The creditors did not dispute Mr Dickson's right to claim, but objected to his mode of stating the balance on his debt. He, as in progressive accounts, had calculated interest upon his debt from Martinmas 1770, till he received the first partial payment, which he applied to the extinction of the accumulated sum, and then calculated interest on the balance, till he received another partial payment, which he again deducted from the whole debt, principal and interest, then due to him.

The creditors, on the other hand, insisted, that the payments should not be imputed periodically in this manner; but that the sums received by him at different periods should be brought to a corresponding capital, as at Martinmas 1770, *i. e.* to a sum which, with simple interest upon it from that term, made up the total of what he had received. The account of partial payments stated, in this way, amounted to L. 578 : 13 : 4, leaving a balance of L. 609 : 11 : 8, for which Dickson fell to draw along with the other creditors.

In support of their objection, the creditors

Pleaded; Were Mr Dickson's mode of calculation adopted, he would, by means of his repeated accumulations of interest into a principal sum, draw a larger proportion of the funds *in medio* than the other creditors, whose debts are ranked in the same class with his own. By the mode which they propose, he, like them, will draw for his full accumulated sum, as at Martinmas 1770, with simple interest from that term, which is all he can justly demand. The Court, by granting the interim warrant, did not mean to injure the other creditors, nor did he, when he obtained it, desire to have any preference; on the contrary, he offered to find caution to pay back his proportion of any deficiency of the funds, at the ultimate division.

Answered; The method followed by Mr Dickson of imputing partial payments, is the simple and common one, and is always used in accounting between debtor and creditor. General Douglas' cautioners must account in that manner for the balance due by them. By the act and warrant, the sum of L. 1188 : 5s. of the price, with all the interest which should become due upon it, was withdrawn from the common fund, in satisfaction of Mr Dickson's debt. The other creditors have no further connection with this sum; and indeed they have no interest to object to the mode proposed, as General Doug-

las' cautioners, who are solvent, must repay them whatever additional sum he draws from the sums *in medio*.

No 38.

Replied; If Mr Dickson were demanding the balance of his debt from General Douglas, or his cautioners, perhaps his mode of calculating it might be well founded; but since, in place of recovering from them in virtue of his interim warrant, he chooses to make his claim out of the funds now under division, he cannot be allowed to state it in any way which will give him a larger proportion of them than the other creditors who did not apply for interim warrants. 17th January 1792, York Buildings Company against Brown, No 36. p. 13339.; and 27th November 1793, Murray against Blair, *supra*.

THE LORD ORDINARY "found, That Mr John Dickson was not entitled to impute the partial payments received by David Dickson his cedent, periodically to the interest of his debt."

THE COURT, on advising a reclaiming petition for David Dickson's Trustee, and answers for the Creditors, unanimously adhered; "reserving, however, to the petitioner his claim against General Douglas, the purchaser, and his cautioners personally, in settling with them for the balance of his debt, of imputing the partial payments to the interest due at the time such partial payments were obtained, and the remainder only in extinction of the principal sum contained in his act and warrant; and reserving to the said General Douglas, and his cautioners, their objections thereto, as accords."

POINT II.

THE Trustee for Mr Dickson further claimed, that he should be allowed deduction from the partial payments received by his constituent of the expense of obtaining and extracting the interim warrant; and

Pleaded; As the interim warrant is in effect a partial decree of division, it should be on the same footing with a total one, the expense of which is always defrayed from the common fund. Besides, if the warrant had not been extracted, the whole proceedings contained in it would have gone to the ultimate general extract; and as the expense of the latter will be proportionally diminished in consequence of the partial extract, the expense of it should, on that account, be allowed.

Answered; The act and warrant contains nothing but the proceedings which took place on the petition applying for it, which Mr Dickson gave in for his own convenience; and as these proceedings would not have taken place if it had not been presented, the expense of extracting them should be defrayed by himself.

Observed on the Bench; Interim warrants should be very sparingly granted, as they frequently occasion much confusion and litigation, and when they are, the whole expense attending them should be defrayed by those creditors who apply for them.

Is a creditor in a judicial sale, who obtains an interim warrant, entitled to the expense of extracting it out of the common fund?

No 38. THE LORD ORDINARY found, that " John Dickson is not entitled to deduct, from the partial payments, the expense David Dickson was put to in extracting the act and warrant in his favour."

THE COURT unanimously adhered.

Lord Ordinary, *Craig*. For Dickson, *M. Ross*. Alt. *Hay*. Clerk, *Menzies*.
R. D. *Fol. Dic. v. 4. p. 215.* *Fac. Col. No 155. p. 354.*

S E C T. VIII.

Effect of a Decree of Sale, &c.

1720. *June 21.*

COUPAR *alias* CHALMERS *against* Sir ANDREW MIRETON of Gogar.

No 39.

AN estate having been sold at a public roup for the debts of the liferenter, by an alleged collusion betwixt him and his creditors, during the infancy of his son the fiar, who thereafter brought a reduction and improbation to set aside the purchaser's title to the estate, as acquired *a non domino*, without authority of the acts of Parliament, which give no power to the Court of Session to sell one man's estate for paying another man's debts; the LORDS found the decret of sale was a sufficient production made for the purchaser to exclude the pursuer's title. See APPENDIX.

Fol. Dic. v. 2. p. 312.

No 40.

1739. *July 24.* DONATAR of WARD *against* CREDITORS of BONHARD.

A PUBLIC sale does not purge the estate of the debts and diligences affecting the same. These remain a burden upon the estate until the purchaser make payment of the price. See APPENDIX.

Fol. Dic. v. 2. p. 312.

1753. *July 28.* URQUHART *against* OFFICERS of STATE.

No 41.

A DECREE of sale does not deprive persons of their right who were not parties to the process, nor derived right from the bankrupt's predecessors.

Fac. Col.

*** This case is No 15. p. 9919. *voce* PATRONAGE.